Syarikat 3M Malaysia Sdn Bhd v Nik Kamaruddin bin Ismail

HIGH COURT (KUALA LUMPUR) — ORIGINATING MOTION NO R8-25-17-89
EUSOFF CHIN J
21 NOVEMBER 1989

Labour Law — Workman — Whether claimant was a workman under s 2 of Industrial Relations Act 1967 — Claimant a director of company but not paid director's fees — Conditions under which employees are not workmen — Industrial Relations Act 1967, s 2

The question for decision in this application for an order of certiorari by Syarikat 3M Malaysia Sdn Bhd ('the company') is whether the respondent Nik Kamaruddin ('the claimant') was a workman as defined under s 2 of the Industrial Relations Act 1967 ('the Act'). The company contended that the claimant was not a workman and that the Industrial Court had no jurisdiction to hear and determine the reference to it by the Minister under s 20(3) of the Act. The claimant joined the company on 4 March 1974, and became a marketing coordinator on 9 April 1976. On 6 May 1977 he became the marketing manager, and on 1 October 1984 he was made the sales director. On 15 October 1984 the company made him a member of the board of directors and he was registered as such under s 141(6) of the Companies Act 1965 on 1 November 1984. Effective from 5 January 1987, the claimant was appointed the director of the physical distribution department but on 4 February 1987, before he actually started to perform the duties of that post, he signed a letter resigning from the board of directors. By another letter dated 5 February 1987 addressed to the managing director of the company, the claimant put his signature to another resignation. The claimant testified that it was this second letter that was forced upon him and which he signed under duress.

Held, dismissing the company's application:

(1) The Industrial Court was correct in requiring the company to prove that the claimant was not a workman because it was the company which raised the preliminary issue when challenging the jurisdiction of the Industrial Court by alleging that the claimant was not a workman.

(2) The Industrial Court had indeed determined that the claimant was a director of the company, but the Industrial Court had gone a step further to determine on the evidence before it whether or not the claimant was truly functioning as a director of the company or was just a figure-head director as alleged by the claimant that 'they were putting me as a Bumi, probably for a showpiece'.

(3) The court was inclined to think that the Industrial Court was not concerned with nomenclature or position held by the claimant, but was concerned to get the truth of the claimant's duties and functions in the company. In this case, in order to determine whether the claimant was or was not a workman, the Industrial Court had heard oral evidence, and perused documents submitted to it, and came to the conclusion that from the duties and functions performed by the claimant, he could not be said to be the mind and brain of the company. A figure-head director who merely signs documents as directed by the company's board of directors certainly cannot be said to be a part of the mind and brain of the company.

(4) The court found that the Industrial Court had not misdirected itself in law and jurisdiction or misapprehended the facts before it when making the ruling in the award.

[*Editorial Note*: The company has appealed to the Supreme Court vide Civil Appeal No 02-403 of 1989.]

Case referred to

1 *Inchcape Malaysia Holdings Bhd* v *RB Gray & Anor* [1985] 2 MLJ 297 (folld)

Legislation referred to

Companies Act 1965 s 141(6)
Industrial Relations Act 1967 s 20(3)

Cur Adv Vult

Eusoff Chin J: Syarikat 3M Malaysia Sdn Bhd ('the company') had raised a preliminary objection in the Industrial Court Case No 1:5/4-200/87 that Nik Kamaruddin bin Ismail ('the claimant') was not a workman as defined under s 2 of the Industrial Relations Act 1967 ('the Act'), and therefore the Industrial Court had no jurisdiction to hear and determine the reference to it by the Minister under s 20(3) of the Act. On 18 August 1988 the Industrial Court made an Award No 207/1988(1) by which it ruled that the claimant was a workman. This application for an order of certiorari is to quash that Industrial Court ruling.

The claimant joined the company on 4 March 1974, and became a marketing coordinator on 9 April 1976. On 6 May 1977 he became the marketing manager, and on 1 October 1984 he was made the sales director. On 15 October 1984 the company made him a member of the board of directors and he was registered as such under the Companies Act 1965, s 141(6), on 1 November 1984.

Effective from 5 January 1987 the claimant was appointed the director of the physical distribution department but on 4 February 1987 (according to him) before he actually started to perform the duties of that post, he signed a letter (court exh Co-12, undated) resigning from the board of directors wherein he stated:

> 3M Malaysia Sdn Bhd and to all directors thereof:
>
> I hereby tender my resignation as a member of the board of directors of 3M Sdn Bhd the same to take effect upon the acceptance by the board of directors.
>
> Very truly yours,
>
> Sgd
> Nik Kamaruddin bin Ismail

In Form 49 of the Companies Act 1965, a 'Return giving particulars of directors, managers and secretaries and changes of particulars', the company informed the Registrar of Companies that the claimant had resigned 'wef 6 April 1987' as a director of the board. This was after a board meeting held on that date accepting the claimant's resignation.

By another letter, this one dated 5 February 1987 (court exh Co-1) addressed to the managing director of the

company, the claimant put his signature to another resignation which states:

> This is to inform you that I wish to resign on my own accord from 3M Malaysia as a distribution director with effect from 5 February 1987. I would like to take this opportunity to thank you and the company for all the support given to me during my 13 years tenure with the company.

The claimant testified that it was this second letter that was forced upon him and which he signed under duress. As regards the first letter (Industrial Court exh Co-12, undated) he testified:

> I did not prepare Co-12. I did not draft it. It is my signature. I signed it. I signed this on 4 February. In the morning Mr Robert Taylor, the MD, called me to his room and asked me to sign this letter. That was on 4 February 1987. I signed it when he asked me to sign. I was happy to resign as a member of the board. Because it was more a liability than an asset. I felt they were putting me as a Bumi, probably for a showpiece.

Mr Robert Taylor died on 5 October 1987, and Yip Ah Kai, the sole witness for the company, could not rebut the claimant's evidence that he signed his resignation from the board on 4 February 1987. Yip did not know when, or the circumstances under which, it was signed.

The Industrial Court in its award quoted part of the company witness Yip Ah Kai's testimony before it and part of Mr Lobo's submission which are as follows:

> As sales director, the claimant under company policy had no power to dismiss employees as director of the board. He had authority of employing people with the approval of the MD only ...
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> Yes, the MD was the man running the company.... The travelling claims of the claimant were approved by the MD.

Yip also testified that:

i) the claimant was paid a salary and employees' provident fund deductions were made;
ii) he never received any director's fees;
iii) his job description and job specifications were the same as those of the four other group sales and marketing managers in the company (see court exh Co-26).

Mr Lobo also pointed to the claimant's testimony wherein he testified that:

a) when he signed documents in the company, he signed as group sales and marketing manager, not as sales director;
b) he had never attended any board of directors meeting;
c) that in court exhs 20A, B, C, D, E, F and G — extracted minutes of the board of directors meetings in which the claimant was recorded as having attended — his name was 'wrongly inserted'; and that
d) he was only a figure-head director.

The Industrial Court had considered a Supreme Court case, *Inchcape Malaysia Holdings Bhd* v *RB Gray & Anor*,[1] and came to the following conclusion:

> It is this court's considered view, the ratio decidendi of the *Inchcape* case [1985] 2 MLJ 297, is that the only employees of a company who may not be treated as workmen under the Act are limited to those who are 'the very brain of the company or the directing mind determining and formulating the company's policy' (per Salleh Abas LP (as he then was) at p 304).
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> As it is the unrebutted evidence that the claimant held a contract of employment to work for hire or reward (see definition of 'workman' in s 2 of the Act) as one of the company's group sales and marketing managers, the burden is on the company before this court to prove that he was also the very brain or controlling mind of the company to exclude him from being treated as a workman. And this, from the evidence before the court, the company has obviously failed to do.
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> The irresistible conclusion of the court therefore is that the claimant was a workman on or about 5 February 1987 (the material time in which he claimed he was constructively dismissed) and the court so rules.

Before me, learned counsel for the applicant company submitted that the Industrial Court had made a mistake when it required the company to prove that the claimant was not a workman. He submitted that the burden of proof should be on the claimant to prove that he was a workman. I think the Industrial Court had correctly decided this because it was the company which raised the preliminary issue when challenging the jurisdiction of the Industrial Court by alleging that the claimant was not a workman.

Learned counsel for the applicant company also submitted that in the case of managerial staff of a company, it is necessary to determine if such staff are a part of the mind and brain of the company. After perusing the Industrial Court award, I find that the Industrial Court had indeed determined that the claimant was a director of the company, but the Industrial Court had gone a step further to determine, on the evidence before it, whether or not the claimant was truly functioning as a director of the company or was just a figure-head director as alleged by the claimant that 'they were putting me as a Bumi, probably for a showpiece'.

Notwithstanding that the Industrial Court had determined that the claimant was a director of the company, it had come to the conclusion that the claimant was not the brain and mind of the company. The Industrial Court did not say why it came to that conclusion. But the fact that the Industrial Court had quoted extracts of the evidence of Yip Ah Kai, that of the claimant and Mr Lobo's submission in its award, goes to show that the Industrial Court believed that the claimant was a non-functioning figure-head director put there by the company to fill up the 'Bumi' requirement especially when Yip himself admitted that the claimant was not even paid any director's fees. I am inclined to think that the Industrial Court was not concerned with nomenclature or position held by the claimant, but was concerned to get the truth of the claimant's duties and functions in the company. In this case, in order to determine whether the claimant was or was not a

workman, the Industrial Court had heard oral evidence, and perused documents submitted to it, and came to the conclusion that from the duties and functions performed by the claimant, he could not be said to be the mind and brain of the company. A figure-head director who merely signs documents as directed by the company's board of directors certainly cannot be said to be a part of the mind and brain of the company.

I therefore find that the Industrial Court had not misdirected itself in law and jurisdiction or misapprehended the facts before it when making the ruling in the award. I dismissed the applicant's claim with costs.

Application dismissed.

Solicitors: *Shook Lin & Bok; Lobo & Associates.*

Reported by *Wong Kim Fatt*

Public Prosecutor v Tan Choon Ang

HIGH COURT (KUCHING) — CRIMINAL REVISION NO KG 2 OF 1988
HAIDAR J
2 NOVEMBER 1989

Criminal Procedure — Preliminary inquiry — Duty of magistrate to decide if there is credible evidence — Not required to assess credibility of witnesses — Duty to decide on admissibility of cautioned statement — 'Magistrate' to include 'President' — Criminal Procedure Code (FMS Cap 6), ss 139(i), 140, 141 & 143(b)

The accused was charged under s 302 of the Penal Code (FMS Cap 45) for murder. At the end of the preliminary inquiry, the magistrate amended the charge to one under s 304 of the Penal Code (FMS Cap 45) and directed that the accused be tried before the sessions court. The deputy public prosecutor applied to the High Court to exercise its revisionary powers and set aside the order as there were sufficient grounds to commit the accused for trial on the original charge.

Held, affirming the order of the magistrate:

(1) The relevant powers of a magistrate in a preliminary inquiry are contained in Chapter XVII of the Criminal Procedure Code (FMS Cap 6), in particular ss 140 and 141. The duty of a magistrate in a preliminary inquiry is to consider if there is credible evidence to commit the accused for trial in the High Court.

(2) A preliminary inquiry is not a trial and it is not the duty of the magistrate to be satisfied that the prosecution has established a prima facie case. Neither is the magistrate required to assess the credibility of the witnesses or to contemplate the accused's possible defence.

(3) It is the duty of the magistrate to decide on the admissibility of a cautioned statement. As the defence in the instant case did not seriously challenge the admissibility of the cautioned statement, the magistrate was entitled under s 139(i) of the Criminal Procedure Code (FMS Cap 6) to look at the evidence of the cautioned statement to see if there was credible evidence against the accused. However, it is not the function of the magistrate to evaluate which evidence to accept or to reject but to leave such doubts for the trial court to resolve.

(4) On the evidence presented by the prosecution, there was insufficient evidence to constitute the ingredients of the charge under s 302. Apart from the cautioned statement of the accused and evidence that the accused befriended the deceased, there was no evidence to show that the accused was last seen with the deceased immediately before the death.

(5) A magistrate may, when a preliminary inquiry discloses an offence triable by a sessions court, frame a charge for that offence, and transfer the case for hearing before a president of a sessions court. The word 'magistrate' in s 140(i)(b) of the Criminal Procedure Code (FMS Cap 6) would include 'president'.

Cases referred to

1 *Re Low Kuan Meng* [1962] MLJ 265 (folld)
2 *In Re Pang Po Pah* [1985] 2 MLJ 214 (folld)
3 *Re Osman bin Abdullah* [1954] MLJ 237 (refd)
4 *PP* v *Ng Goh Weng & Anor* [1979] 1 MLJ 127 (folld)

Legislation referred to

Criminal Procedure Code (FMS Cap 6) ss 139(i), 140, 141, 143(b)

Nik Suhaimi (Deputy Public Prosecutor) for the Public Prosecutor.

Anthony Tai for the accused.

Cur Adv Vult

Haidar J: The accused, Tan Choon Ang alias Tan Choon Yeong, was charged in the magistrate's court for an offence under s 302 of the Penal Code (FMS Cap 45) ('the Penal Code') for the murder of one Lam Po Oi on 4 May 1987 at about 6.25pm, at the Anglican Cemetary, 13 km Batu Kitang Road, Kuching. At the end of the preliminary inquiry, the learned magistrate amended the said charge to one under s 304 of the Penal Code and directed that the accused be tried before the sessions court and made the order of transfer of the case accordingly.

Encik Abdul Rahman, the deputy public prosecutor, vide letter dated 29 December 1988, urged the court to exercise its revisionary powers to set aside the order made by the learned magistrate on the ground that she had erred in law in not committing the accused to the High Court as there are sufficient grounds to commit the accused for an offence under s 302 and to direct her accordingly. In view of the application of the deputy public prosecutor, I agreed to call for the record of the proceedings so as to satisfy myself of the legality or otherwise of her order.

On 4 September 1989, I heard the arguments of the deputy public prosecutor and defence counsel wherein I reserved my judgment. I now proceed to give my judgment.

The relevant powers of a magistrate in a preliminary inquiry are spelt out in Chapter XVII of the Criminal Procedure Code (FMS Cap 6) ('CPC'), the relevant provisions for the purpose of this revision being ss 140 and 141. Section 140(i) reads: